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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1002

FRITZ B. WAGOR, JOHN L. AVANT, et al.,
as Trustees of Dade County Construction Industry
Advancement Fund,

Petitioners,

versus

CAL KOVENS CONSTRUCTION CORPORATION,

Respondent

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

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IN THE

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FRITZ B. WAGOR, JOHN L. AVANT, et al., as Trustees of Dade County Construction Industry Advancement Fund,

Petitioners,

versus

CAL KOVENS CONSTRUCTION CORPORATION,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

FRITZ B. WAGOR, JOHN L. AVANT, et al., as Trustees of Dade County Construction Industry Advancement Fund ("Petitioners") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 17, 1967 and issued as its mandate on October 19, 1967 after denial of Petitioners' Petition for Rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra* pp. 1a-6a; R., Vol. II, 69) is reported at 382 F.2d 813. The per curiam order denying Petitioners' Petition for Rehearing from such opinion (Appendix A, *infra* p. 7a; R., Vol. II, 83) is unreported. The Final Judgment for Respondent of the District Court (Appendix A, *infra* p. 10; R., Vol. I, 65) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1967, that Court denied Petitioners' Petition for Rehearing by per curiam order entered on October 11, 1967 and on October 19, 1967 that Court issued the Judgment of July 17, 1967 as its mandate (Appendix A, *infra* p. 8a; R., Vol. II, 75). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Court of Appeals held that an employer who did not formally execute a collective bargaining agreement negotiated by others can accept the benefits of that agreement but comply only with those obligations of the agreement which it wishes to assume and disregard all others. The Court of Appeals reached this decision not by formulating a substantive law of collective bargaining agreements, based on the national labor laws, but under common-law concepts of contracts, and in so doing sanctioned a criminal violation of one of the national labor laws.

Accordingly, the questions presented to this Court are:

1. Whether the Court of Appeals ignored the mandate of *Lincoln Mills (Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1959)) to fashion a "federal law from the policy of our national labor laws" by restricting this mandate to the issue of whether arbitration under a collective bargaining agreement should be ordered or enforced, rather than broad substantive matters involving the creation of a federal law for enforcement of collective bargaining agreements.

2. Whether the Court of Appeals in permitting Respondent to accept benefits of a collective bargaining agreement secured through multi-employer bargaining by employer associations, but to ignore the obligations of that agreement undermined the structure of employer associations and multi-employer bargaining and thereby frustrated the effort of the national labor laws to foster industrial peace and stability.

3. Whether the Court of Appeals in permitting Respondent to accept the benefits of an industry-wide collective bargaining agreement bu to ignore the obligations of that agreement destroyed the basis for industrial peace and stability.

4. Whether the Court of Appeals has sanctioned a criminal violation by Respondent of Section 302 of the Labor Management Relations Act of 1947.

STATUTES INVOLVED

The statutory provisions involved are Sections 1(b), 301(a), 302(a), 302(b), 302(c)(5)(B) and 302(d) of the Labor Management Relations Act of 1947 (the "LMRA"). These provisions are printed in Appendix B hereto.

STATEMENT OF THE CASE

This action was brought in the United States District Court, Southern District of Florida, invoking the jurisdiction of the District Court under Section 301 of the LMRA.

Petitioners are Trustees of the Dade County Construction Industry Advancement Fund (the "Industry Fund") established July 1, 1963 pursuant to the provisions of a collective bargaining agreement (the "Agreement") between the Carpenters' District Council of Miami, Florida and Vicinity (the "Union") and South Florida Chapter, The Associated General Contractors of America and Home Builders Association of South Florida (collectively referred to as the "Associations") (R., Vol. I, 19). The Associations, comprised of building contractors, negotiated the Agreement with the Union for the construction industry in Dade County, Florida. As the Court of Appeals noted, the contract "established working conditions, wages and fringe benefits for union carpenters employed in Dade County." Appendix A, *infra*, p. 2a, R., Vol. II, 69.

Respondent is a contractor, who while not a member of either of the Associations, employed union carpenters in Dade County.

Petitioners seek by this suit to require Respondent to make payments to the Industry Fund pursuant to the Agreement. Although it adopted the Agreement, Respondent has refused to make such payments.

The working conditions, wages and fringe benefits established by the Agreement (set forth at R., Vol. I, 19-33) consist of the wage scale itself (R., Vol. I, 21-24), fringe benefits (R., Vol. I, 25), payment to a Health and Welfare Fund for each employee hour worked (R., Vol. I, 28-29) and payment to the Industry Fund for each employee hour worked (R., Vol. I, 29-32).

The Health and Welfare Fund established under the Agreement was jointly administered by trustees appointed by the Union on one side and the Associations on the other and provides health and welfare benefits to carpenter employees of all participating employers. The Industry Fund is administered by trustees appointed by the Associations (the Union is barred by the provisions of Section 302 of the LMRA from jointly administering such a trust) and provides funds for specified purposes to advance the Dade County construction industry through promotional efforts on behalf of the entire construction industry. This Fund thus provides equal benefits to all employers engaged in the construction industry, whether members of the Associations or not and employees of all such employers (R., Vol. I, 30).

Respondent did not sign the Agreement. It did,

however, adopt the Agreement. The only way Respondent could get union carpenters was under the Agreement, which as the Court of Appeals noted "established . . . working conditions for union carpenters employed in Dade County". To get union carpenters Respondent adopted the Agreement and complied in all respects with the Agreement except for its requirement of payments to the Industry Fund for each employee hour worked. (R., Vol. I, 37).

Payments for the two funds were made by the contractor in one check to an escrow account (R., Vol. I, 28-29) on one reporting form entitled: "DADE COUNTY CONSTRUCTION EMPLOYEES HEALTH AND WELFARE FUND — CONSTRUCTION INDUSTRY ADVANCEMENT FUND." (R., Vol. I, 62). The form makes specific reference to, and incorporates, the Agreement (R., Vol. I, 63). Respondent used this form, thereby acknowledging that the payments were in accordance with the Agreement, but had a line drawn through the Industry Fund payment and limited its payment to the other funds required under the form (R., Vol. I, 62).

The provision for the Industry Fund was carefully negotiated and was integral to the Agreement. The requirement for payments to the Industry Fund is prefaced: "In consideration of the mutual premises and covenants expressed herein . . . " (R., Vol. I, 29). The Agreement further provides:

> " . . . the terms and conditions set forth in this Agreement shall be the same with any Employer irrespective of their membership or non-membership in said Associations; and no more favorable

terms or conditions will be given to any Employer during the term of this Agreement." (R., Vol. I, 27).

Nevertheless the District Court found as a matter of law that Respondent was not bound by the terms of the Agreement to make the payments to the Industry Fund required by the Agreement. The Court of Appeals affirmed this decision.

REASONS FOR GRANTING THE WRIT

Industrial stability requires that collective bargaining agreements negotiated by employer associations and unions for an industry be given effect in that industry. The Court of Appeals determined that an employer nonsigner of a collective bargaining agreement negotiated by others for the industry of which that employer is a part may avail itself of all the benefits of that agreement but selectively reject the obligations of the agreement. This decision destroys industry-wide bargaining agreements, minimizes the effectiveness of multi-employer associations and frustrates the industrial stability which the national labor laws have sought to foster. Therefore, it is in conflict with the national labor laws and nullifies the effect of this Court's mandate in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 455-456 (1959) that Section 301 of the LMRA "expresses a federal policy that federal courts should enforce . . . [collective bargaining] agreements" by formulation of a " . . . substantive law . . . from the policy of our national labor laws." This decision of the Court of Appeals raises a question of great importance relating to the scope of the substantive law to be estab-

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lished pursuant to *Lincoln Mills* and to the effectuation of the Congressional policy of fostering industrial stability.

The decision of the Court of Appeals restricts *Lincoln Mills* to arbitration matters. In so doing, it ignores the mandate of *Lincoln Mills*. In addition, the decision of the Court of Appeals is in direct conflict with decisions of other Courts of Appeals, such as *Lewis v. Seanor Coal Company*, 382 F. 2d 437 (3rd Cir. 1967) following *Lincoln Mills* and acknowledging the duty to fashion a substantive law of collective bargaining agreements, based not on traditional contract law but on the policy of the national labor laws.

In addition, the decision of the Court of Appeals must be an erroneous application of the national labor laws which it was required to effectuate, in that the effect of the decision is to sanction a criminal violation by Respondent of Section 302 of the LMRA. A more erroneous creation of substantive law would be hard to imagine.

1. The decision of the Court of Appeals is in error because it destroys industrial stability by denying the integrity of an industry-wide collective bargaining agreement negotiated by employer associations and a union for that industry. It therefore is contrary to the *Lincoln Mills* mandate. *Lincoln Mills* enjoined the federal courts to enforce collective bargaining agreements in "that industrial peace can best be obtained only in that way." (*Id.* at 455). *Lincoln Mills* made clear that the carrying out of this federal policy, required by Section 301 of the LMRA, meant the formulation of a new federal law based on "the policy of our national labor laws" and principally derived from the LMRA, other labor statutes, legislative history

and policy. *Id.* at pp. 456-457. In so doing *Lincoln Mills* carried out the legislative purpose set forth in Section 1(b) of the LMRA to foster industrial stability.

The substantive law of collective bargaining agreements fashioned pursuant to the *Lincoln Mills* mandate must recognize that "a collective bargaining agreement is not an ordinary contract for the purchase of goods and services nor is it governed by the same old common-law concepts which control such private contracts". *Transportation-Communications Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 160-161 (1966). The District Court and the Court of Appeals ignored these precepts and decided this case on "the same old common-law concepts which control . . . private contracts".

To date, virtually all cases arising under *Lincoln Mills* have dealt with the single issue of requiring or enforcing arbitration under a collective bargaining agreement. These decisions recognize that a collective bargaining agreement is the cornerstone of labor management stability. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). The decision of the Court of Appeals, instead of promoting industry stability, destroys the industry-wide collective bargaining agreement. If any nonsigning employer may receive all benefits of an agreement, but may selectively reject its obligations, no employer will ever sign such an agreement. Certainly such a result is not in the interest of stabilizing labor-management relations through collective bargaining agreements.

The effect of the decision of the Court of Appeals is to stop the formulation of this new federal law at its first

stage of development. Since the requirement or enforcement of arbitration is itself only a means of giving further stability to collective bargaining agreements, limitation of *Lincoln Mills* to that single step refutes the very basis for *Lincoln Mills.*

In addition, the decision of the Court of Appeals is in direct conflict with the decisions of other courts, such as in *Lewis v. Seanor Coal Company,* (382 F. 2d 437 (3rd Cir. 1967).) In this case, which involved the validity of an oral agreement under Section 302 (c) (5) of the LMRA, the company attempted to dismiss a suit brought against it by trustees of a health and welfare fund on the grounds that the Union which was a party to that agreement had orally modified it. The court held that the disposition of the claim was controlled by the court's "duty . . . to fashion a body of federal common law for the enforcement of collective bargaining agreements," giving "particular emphasis . . . to the legislative history of labor legislation."

Here the Court of Appeals has rejected the requirement that it enforce the collective bargaining agreement. Instead, by reason of its erroneous interpretation of its obligations under *Lincoln Mills,* it has denied Petitioners' attempt to enforce the Agreement here involved.

2. The decision of the Court of Appeals is in error because it destroys industrial stability by denying any special validity to employer associations. This Court has determined that multi-employer bargaining through employer associations has not only been sanctioned by the national labor laws, but also is of sufficient importance that its protection against union attack warrants severe measures. Thus in *NLRB v. Truck Drivers Local 449,*

353 U.S. 87, 94-96 (1957), this Court concluded that Congress had recognized that, in many industries (one of them the construction industry here involved) multi-employer bargaining through employer associations is a vital factor in the effectuation of the national policy of promotion of labor peace through the strengthening of collective bargaining and protection of the multi-employer unit warrants locking out employees. This Court recently reaffirmed the principle of such protection of "multi-employer bargaining units." *NLRB v. Brown*, 380 U.S. 278, 289 (1965).

That multi-employer associations materially contribute to industrial stability has been recognized not only by this Court in these two cases, but also by most prominent authorities.

> "The wider the basis of discussion, the more likely it is that the negotiations will be in the hands of experienced leaders and that they will bring to their aid staffs of experts with pertinent data revealing the long range implications of the proposals discussed. In a word, better organization for bargaining means more intelligent and responsible negotiation on the part of management and labor alike. Much can be achieved, moreover, by an industry acting as a unit: it becomes possible to think of such problems as technological displacement on an industry basis and so to achieve social and economic gains that no company could undertake alone. Labor desires industry-wide bargaining, partly because it avoids wasting of manpower in successive negotiations with a number of employers partly be-

cause it may secure gains which no one employer can grant for fear of competitive disadvantage. It is doubtless also a factor that centralization strengthens the leaders' control. Many businessmen have come to the same conclusion for similar reasons: competitive disadvantages based on disparities in labor cost are reduced if not abolished; the industry as a whole can face strike threats which might be disastrous to a single employer through the loss of his market; the national officers of a union are likely to have a better understanding of management problems than local leaders and in industry-wide bargaining can keep extremists under some measure of control." Cox and Bok, *Labor Law*, 330-331 (1965 ed.).[1]

The sole contrary opinion appears to be that of the Court of Appeals in this case, an opinion reached in reliance on *a 1943 decision* of this Court *interpreting the Railway Labor Act.* It would seem hazardous at best to formulate national labor laws regulating collective bargaining agreements on the basis of a pre-Taft-Hartley judicial decision involving another statute. This certainly is not what *Lincoln Mills* demands.

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[1]For additional discussion of the benefits of employer associations see: *Report of the General Subcommittee on Labor, Committee on Education and Labor,* House of Representatives, 88th Cong., 2d Sess., Multiemployer Association Bargaining and Its Impact on the Collective Bargaining Process (Comm. Print) cited in *Publishers' Association of New York City* v. *NLRB,* 364 F. 2d 293, 296 n. 1 (2nd Cir. 1966); *Local No. 189, Amalgamated Meat Cutters Union* v. *Jewel Tea Co.,* 381 U.S. 676, 713 n. 20 (1965) (Goldberg dissenting) (stating that congressional policy sanctions multi-employer bargaining); Labor Study Group of the Committee for Economic Development: *The Public Interest in National Labor Policy* 134-135 (1961) (a study group consisting of some of the most prominent names in the field recommended strengthening employer associations).

If the Court of Appeals decision stands Respondent has obtained all the benefits of belonging to an employer association without accepting any of the responsibilities. This gives employers who do not participate in such associations an option, to wait until negotiations are finished and then adopt an agreement negotiated by an employer association without accepting its concomitant obligations or, if such an agreement is not favorable, to try for a better one.[2] Employer associations are composed of competing individual employers. If the non-participating employer can both avoid the costs of participating in the association and obtain at least as good a contract as the association, it will acquire a competitive advantage.[3]

Such an advantage by itself impairs industrial stability. But in addition, the principle of multi-employer bargaining through employer associations is undermined. Paradoxically, the decision of the Court of Appeals thus undermines multi-employer bargaining units at the same time the National Labor Relations Board appears to be strengthening multi-union bargaining units.

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[2]Under decisional labor law the non-participating employer can always insist on receiving at least as good a contract as the associations negotiated, relying on the union practice of standardizing area agreements in the construction trades. An employer need not previously have entered into a formal agreement to make such a claim. *30th National Labor Relations Board Annual Report for the Fiscal Year Ended June 30, 1965*, 47 (1966). Even bargaining on an individual basis will normally not defeat this right in the non-participating employer. See *The Kroger Co.*, 148 NLRB 569, 573 (1965).

[3]The Associations here attempted to prevent such a competitive advantage by including a "most favored nations" clause in the Agreement. The Court of Appeals dismissed this clause as irrelevant (Appendix A, *infra* 6a) thereby sanctioning the competitive advantage which must result.

3. The decision of the Court of Appeals is manifestly erroneous as a formulation of a substantive law for enforcement of collective bargaining agreements in that its effect is to sanction a criminal violation of Section 302 of the Labor Management Relations Act. Section 302(a) of the LMRA prohibits payments by an employer, such as Respondent, to a union representative. Each union trustee of the Health and Welfare Fund created under the Agreement was a Union representative. Respondent made the payments required by the Agreement to the Health and Welfare Fund. Therefore, Respondent committed a violation of Section 302, unless its payments were made pursuant to the specific exceptions of Section 302(c)(5), and specifically the requirement of Section 302(c)(5)(B) that the payments were pursuant to a written contract. Such a violation would be a criminal violation under Section 302(d). *United States v. Ryan*, 350 U.S. 299, 305 (1956). Since Respondent did not *sign* any contract with the Union, the only written contract on which Respondent could rely in making its payments to the Health and Welfare Fund was the Agreement itself. But the Court of Appeals held that Respondent did not adopt the Agreement. Therefore, the decision of the Court of Appeals sanctions the criminality of the Respondent in making payments to the Health and Welfare Fund without being party to a written contract. This decision is in conflict with *Lewis v. Seanor Coal Company, supra*, which held that the effect of Section 302 had to be evaluated in reaching the appropriate result and rejected the validity of a claimed oral modification of a written contract because it would have constituted a violation of the legislative policy set forth in Section 302.

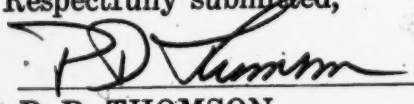
The decision of the Court of Appeals must be an

erroneous interpretation of the federal laws for enforcing collective bargaining agreements; particularly where the alternative — to find that Respondent did adopt the Agreement — furthers the scope and effect of the collective bargaining agreement and creates industrial stability.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



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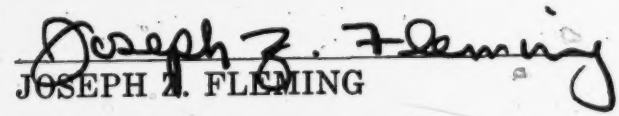

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